

No. 54 September 11, 2006

# H.R. 4954 – Port Security Improvement Act

Calendar No. 432

H.R. 4954 was read the second time, and placed on the Senate Calendar on May 16, 2006.

# Noteworthy

- Under a unanimous consent agreement reached on September 7, 2006, the Senate proceeded to the consideration of H.R. 4954, the House-passed bill, on the same day. Senators Collins, Stevens, and Grassley (along with Senator Reid and the Ranking Members of three Senate committees) immediately offered a substitute amendment as original text for the purposes of further amendments and debate, and it was adopted. *This Legislative Notice addresses the Senate substitute*.
- The substitute amendment represents an agreement from the three committees sharing some jurisdiction over the bill (Senate Homeland Security and Governmental Affairs, Commerce, and Finance).
- By unanimous consent, the Senate debated the bill on Friday, and will resume its
  consideration today, but no votes will occur today. No unanimous consent agreement has
  yet been reached that limits time or amendments. In addition to the adopted substitute
  amendment, two amendments are pending. [See Possible Amendments section of this
  Notice.]
- Since the attacks of September 11, 2001 ("9/11"), policymakers have recognized the possibility that our nation's shipping ports, too, may be terrorist targets. The revelation last month that a major terrorist plot against the United States was in the works by British nationals who allegedly were planning to exploit security flaws in aviation screening underscores Congress's responsibility to address security issues at all of the nation's portals, including shipping ports.
- On May 4, 2006, the House of Representatives passed H.R. 4954 by a vote of 421–2. The Administration issued a Statement of Administration Policy (SAP) that generally supported H.R. 4954. (At press time, no SAP had been issued for the substitute amendment, although one is expected.)

# Highlights

The Senate substitute amendment to H.R. 4954 includes the following:

- **Radiation Monitors at All Ports.** The substitute amendment would require radiation detectors be used on all cargo entering the United States at all U.S. ports.
- <u>Identification Cards for Port Workers.</u> The substitute amendment would impose a deadline for the issuance of identification cards for all workers at U.S. ports.
- **Grants.** The substitute amendment would change existing law to issue grant funds based on *risk* rather than on principles of *equitable* distribution.
- **Existing Programs.** The substitute amendment would authorize and provide guidance on expanding existing programs to screen inbound cargo, and require an expansion of incident planning already required under previous legislation.
- *Non-intrusive Cargo Inspections Systems.* The substitute amendment would create pilot programs for integrated non-intrusive cargo inspection systems.
- <u>New Trade Office.</u> The substitute amendment would create a new office at the Department of Homeland Security (DHS) to enhance international trade.

# Background

## **Port Security: Focus Since 9/11**

Since the attacks of September 11, 2001 ("9/11") using airliners as the means of delivery, policymakers have recognized the possibility that our nation's shipping ports, too, may be terrorist targets. Currently, some 11 million containers move through U.S. maritime ports on an annual basis. The Administration has followed a prudent response to such a terrorist threat by utilizing different layers of screening in line with available technology and resources, and upgrading these processes as new technology, resources, and reduced costs make more rigorous inspections feasible.

The Federal government has completed an enormous amount of work to strengthen U.S. ports since 9/11, including passage of the Maritime Transportation Security Act (MTSA) in 2002, and implementation here and abroad of programs governed by U.S. Customs & Border Protection (CBP).

<sup>&</sup>lt;sup>1</sup> Maritime Containers entering the U.S. totaled 11.3 million in FY2005 (CBP Annual Report). Approximately 60,000 port calls are made each year, constituting 1,258,240,424 metric tons of cargo. U.S. Maritime Administration, "Vessel Calls at U.S. Ports, 2004," July 2005 (available at

http://www.marad.dot.gov/MARAD statistics/vcalls2004.pdf) and "U.S. Customs Ports 1997-2005" (available at http://www.marad.dot.gov/MARAD statistics/index.html#Economic%20Analysis).

### Advanced Manifest Screening and the Automated Targeting System (ATS)

Under this program, all importers must provide advance manifests of all cargo containers brought into the United States. In this layer of screening, the Department of Homeland Security (DHS) will run computer algorithms using various risk factors associated with the cargo listed in each cargo manifest.<sup>2</sup> For example, a well-known importer may have its risk score lowered, while an incomplete or inconsistent manifest will be scrutinized more heavily when the cargo reaches the U.S. port. The algorithm computer program, called the Automated Targeting System (ATS), utilizes 240 factors or rules in determining which containers will be considered high risk and targeted for physical and non-intrusive scanning when reaching an American port.<sup>3</sup> The intelligence community also contributes information to the targeted inspections system.

#### Container Security Initiative (CSI)

In an attempt to address these issues, CBP has negotiated agreements with 44 foreign ports, constituting 75 percent of importations to the United States, to allow for small contingents of CBP agents to inspect cargo as it is loaded onto ships (note that there are over 700, mostly lower-volume, ports importing containers to the United States). This program is called the Container Security Initiative (CSI).

The CBP contingents are too small (due to resource constraints) to inspect all cargo, so they engage in targeted inspections. These officials are dependent on the good will of their foreign hosts in their ability to target cargo and physically inspect them, but cooperative protocols have been worked out to inspect and offload containers. Of great concern to foreign officials is the speed of inspections and the impact on the flow of commerce. Any slowdown costs money for the private traders, domestic commercial interests, and the port itself.

### Customs Trade Partnership Against Terrorism (CTPAT)

In an attempt to mitigate some of these problems and make the most efficient use of all its personnel resources, CBP has tried to encourage private importers to beef up the security of their own supply chain. This program is called the Customs Trade Partnership Against Terrorism, or CTPAT.<sup>5</sup> At present, CBP treats every importer differently, under different standards depending on local conditions, and very few security plans are physically verified by CBP; however, CBP has plans to make regular on-site verification of security plans in the near future.<sup>6</sup> Nevertheless,

<sup>&</sup>lt;sup>2</sup> CBP receives 98 percent of all maritime cargo manifests before they arrive in the U.S. CBP, "Performance and Accountability Report," FY2005, p. 9. The House report for its latest DHS appropriations bill (H.R. 5441) requires that "all inbound cargo is screened through" ATS (p. 9).

<sup>&</sup>lt;sup>3</sup> See Testimony of Richard Stana, Government Accountability Office, House of Representatives Committee on Energy and Commerce, March 31, 2004, GAO-04-557T, and Customs and Border Protection briefing materials for Republican staff, June 23, 2006 (available at RPC upon request).

<sup>&</sup>lt;sup>4</sup> Government Accountability Office (GAO), "Container Security: Flexible Staffing Model and Minimum Equipment Requirements Would Improve Overseas Targeting and Inspection Efforts," April 2005, GAO-05-557. Customs and Border Protection briefing materials for Republican staff, June 23, 2006 (available upon request). CBP, "Performance and Accountability Report," FY2005, p. 25.

<sup>&</sup>lt;sup>5</sup> CBP, "Securing the Global Supply Chain," available at <a href="http://www.cbp.gov/xp/cgov/import/commercial">http://www.cbp.gov/xp/cgov/import/commercial</a> enforcement/ctpat/.

<sup>&</sup>lt;sup>6</sup> GAO, "Homeland Security: Key Cargo Security Programs can be Improved," GAO-05-466T.

companies that follow a CBP-approved supply chain security plan obtain a lower risk score when it comes to the container inspections algorithm. In theory, if a company can secure the supply chain, then no terrorist can slip in contraband with that importer's goods in a container bound for the United States. While this is just another layer in the multilayered approach that CBP is currently employing, it is an important step towards added container security.

#### Non-Intrusive Scanning (VACIS and ICIS)

CBP has employed x-ray scanning, gamma ray scanning, <sup>7</sup> and radiation detection technologies in a variety of settings. At U.S. ports, CBP scans 70 percent of arriving containerized sea cargo for radiological material. By the end of FY06, CBP will scan 80 percent of all incoming sea containers for radiation. By the end of 2007, it is estimated that CBP will scan 98 percent of inbound containers for radiation at U.S. ports.

Vehicle and Cargo Inspections System (VACIS) machines are mobile or stationary machines with a large arm employed right at the dock. These machines can either be moved over a cargo container, or the container can be placed on trucks as they pass under the VACIS arm. A CBP inspector looks at a video screen, and a black and white image of container content outlines appear. If the manifest describes the container as holding tables, for example, an outline of tables should appear on the screen. If a different image appears, a CBP inspector may mark the container for physical inspection.<sup>9</sup>

One of the weaknesses in the VACIS system is that the image it provides can only tell the inspector so much. That is, tables may appear as one large mass because they are packed with other furniture parts, or tightly packed shoes may not show an outline of shoes. Further, containers passing through such a system can only travel at a very slow rate of speed in order for an image to appear. Once the image appears, it can take an inspector up to 15 minutes to evaluate the image; also, there may be considerable problems with scanning fatigue (inspectors cannot remain focused while watching hundreds of images in a given day). Even with the VACIS technology, at the slower rate required for scanning, a massive backlog of cargo would be sitting on the docks, and consumer costs would mount, if 100-percent vetted scanning were required.<sup>10</sup>

In Hong Kong harbor, Science Applications International Corporation (SAIC) (the manufacturer of these non-intrusive scanning devices) is experimenting with three-layered non-intrusive scanning devices. The three layered defense – called the Integrated Cargo Inspection System (or ICIS) – is simply the VACIS gamma-ray machine lined together with a radiation portal monitor and an optical character reader to scan container identification numbers. Incoming trucks

<sup>&</sup>lt;sup>7</sup> Gamma-ray non-intrusive inspection machines can produce images faster than X-ray machines; however, the images have less resolution, especially for densely-packed containers.

<sup>&</sup>lt;sup>8</sup> More information on radiation portal monitors is available at <a href="https://www.saic.com/products/security/at-900s">www.saic.com/products/security/at-900s</a>.

<sup>&</sup>lt;sup>9</sup> According to CBP, "Performance and Accountability Report," FY2005, p. 31, about 8.1 percent of maritime cargo containers were examined using non-intrusive technology such as VACIS.

<sup>&</sup>lt;sup>10</sup> Fortune 100 estimates that each day a container is sits on the docks adds 0.5 percent product value to the cost, Susan Martonosi, et al, "Evaluating the Viability of 100 per cent container inspection at America's Ports," RAND Corp., p. 228, citing C. Spencer, "International Supply Chain Security Regulatory Programs," October 2003.

pass under the monitors at 10 miles per hour while employees monitor the images of the container contents and save copies.<sup>11</sup>

Currently, ICIS is simply a pilot program that has been funded by SAIC and tolerated by Hong Kong authorities. In fact, the Hong Kong authorities have insisted that ICIS process trucks and containers at no less than 10 miles per hour out of concern that even one lane of slowed traffic due to inspections is enough to seriously hamper commerce. Further, although pictures of container images are taken by employees, CBP has not been able to actually examine the images (although, conceivably, as technology is implemented, images could be sent back to the United States by fiber optic wire to CBP's National Targeting Center for newly developed software to sort and inspectors to examine). These images, too, can only show an inspector so much, and prohibited items can certainly be disguised. From the illegal drug trade, we know, for example, that heroine can be disguised in artwork.<sup>12</sup>

#### **House Action**

On May 4, 2006, the House of Representatives passed H.R. 4954, the Security and Accountability for Every (SAFE) Port Act, by a vote of 421–2.

#### **Senate Committee Action**

After the House passed H.R. 4954, the Senate Homeland Security & Governmental Affairs Committee has been in negotiations with the Commerce Committee and the Finance Committee to bridge jurisdictional issues so that a similar bill could be brought to the Senate floor. In early September, the three committees agreed on language. That language is embodied in the Senate substitute amendment to H.R. 4954 that was accepted by unanimous consent on September 7.

# **Bill Provisions**

The following sections provide a summary of the major sections of the Senate substitute to H.R. 4954 as it was accepted by unanimous consent as original text for the purpose of further amendments and debate. A section-by-section summary of H.R. 4954 as it passed the House is available from RPC upon request.

## **Title I: General Security for United States Seaports**

The substitute amendment builds on MTSA in requiring incident planning beyond that required under the MTSA. It requires Department of Homeland Security (DHS) to clear waterways, identify salvage equipment, and reestablish the flow of commerce once a maritime

<sup>&</sup>lt;sup>11</sup> SAIC. "Integrated Container Inspection System (ICIS), Hong Kong Demonstration, Frequently Asked Questions," p. 5. Other information in this section was provided by former Customs Assistant Commissioner, John Hensley, presently Vice President SAIC.

12 Drug Enforcement Agency report on Operation High Step <a href="http://www.dea.gov/pubs/pressrel/pr113005a.html">http://www.dea.gov/pubs/pressrel/pr113005a.html</a>.

transportation security incident occurs. It authorizes qualified individuals to implement DHS-approved security plans for maritime facilities and make unannounced inspections of those facilities. DHS would be required to establish a voluntary, long-range, automated vessel tracking system for select vessels. Existing interagency operational/fusion centers would be expanded to all high-priority ports within three years to facilitate coordination and communication among Federal, State, local, and private sector stakeholders.

#### General Port Operations – Radiation Detection at all Ports

The substitute amendment would require DHS to develop and implement within three years a national strategy for deployment of radiation detection capabilities; by December 31, 2007, all containers entering the U.S. through the busiest 22 seaports shall be examined for radiation. DHS must submit a separate plan for the development of equipment to detect WMD threats at all U.S. ports of entry. DHS would study the need for port user fees to be collected for funding port security. The substitute requires DHS and the State Department to develop a plan for the inspection of passengers and vehicles before loading onto ferries bound for a U.S. port. DHS would also have to develop and implement a plan for random physical inspection of shipping containers (DHS already conducts random searches of cargo presently).

#### Transportation Worker Identification Credential (TWIC)

Under the MTSA, DHS was to create a Transportation Worker Identification Credential (TWIC) for all workers at all U.S. seaports; proposed regulations were published very recently. The substitute requires implementation of the TWIC card at the top 10 busiest seaports by July 1, 2007; at the next 40 strategic ports by January 1, 2008; and, at all other ports by January 1, 2009. It also requires DHS to process applications simultaneously for individuals needing both TWIC and merchant mariner documents.

### Grant and Training Programs

Consistent with 9/11 Commission Report recommendations, the amendment would change existing law to require DHS to allocate grants *based on risk* to port authorities, facility operators, and State and local government agencies to enhance port security activities (\$400 million would be authorized for this for FY 07–FY 11).

DHS (Coast Guard) would also have to establish a training program for seaport incident management, and create an exercise program to test and evaluate the capabilities of Federal, State, local and other relevant stakeholders to coordinate appropriate response and recovery from threats at commercial seaports.

## Title II: Security of the International Supply Chain

DHS would be required to develop and update a strategic plan to improve the security of the international cargo supply chain, including establishing protocols for the resumption of trade; an incident manager would have to implement the plan in reaction to a port security incident.

The Coast Guard would (and would be the lead agency to) ensure the safe and secure transit of vessels to U.S. ports. Preference would be given to certain vessels and CSI and CTPAT cargo (see Background section, above) in the resumption of trade.

### Cargo Risk Assessment Algorithm: Automated Targeting System (ATS).

As discussed in the Background section above, DHS utilizes advanced submissions of manifest data and the ATS algorithm to provide risk assessment and identify cargo for further inspection. Under the substitute amendment, DHS could request the submission of additional data (non-manifest data) for container cargo moving through the international supply chain (authorization of funds is provided). DHS would have to promulgate regulations to establish minimum standards and procedures for securing containers in transit to the U.S.

### Container Security Initiative (CSI)

Authorize the CSI program (described in the Background section) to identify, examine or search U.S.-bound maritime containers at foreign ports. DHS would establish standards for the use of nonintrusive imaging and radiation detection equipment at CSI ports. DHS would also develop a plan to ensure adequate staffing at CSI ports. (Note: although the foreign ports involved in the largest amount of trade with the United States cooperate in the CSI program, most of the over 700 ports importing cargo to the United States do not; staffing has been an issue in the CSI program.)

### Customs-Trade Partnership Against Terrorism (CTPAT)

The substitute amendment would authorize DHS to establish a voluntary (and already existing) CTPAT program (with minimum standards) to allow importers to cooperate with DHS in securing their own (or their part of the) supply chain. Based on the level of cooperation, security, and verification, CTPAT importers would receive a lower risk assessment score in ATS (and therefore, be less at risk for a full inspection of their cargo and a consequent slowdown in their commercial flow). DHS could deny the benefits in part or in whole, including suspension or elimination for at least five years, of any participant that fails to meet CTPAT requirements or knowingly provides false or misleading information. The CTPAT participants would be broken down into tiers (which DHS would validate and revalidate):

- **Tier 1:** Lower ATS risk score for participants that meet the minimum standards; DHS should complete Tier 1 applications within 90 days of submission.
- **Tier 2:** If these participants meet a higher level of security in their supply chain, they would have reduced cargo examinations and priority processing. DHS would be required to validate the security measures, including on-site assessments, within one year of certification.
- **Tier 3:** If participants meet the highest level of security in their supply chain, benefits would include expedited release of cargo, further reduced examinations, reduced bonding requirements, and notification of specific alerts and post-incident procedures as well as inclusion in joint incident management exercises, as appropriate.

DHS would have to increase, by at least 50 positions annually for fiscal years 2007 through 2009, the number of personnel to validate and revalidate CTPAT members (authorization of funds is included).

The amendment (section 405) would require DHS to submit a report to Congress assessing the various aspects of in-bond cargo (tracking, technologies, evaluation criteria for targeting and examining in-bond cargo) and the feasibility of reducing the transit time for in-bond shipments.

#### Integrated Cargo Inspection Systems

The substitute amendment would require the development of a pilot program, within one year, in three foreign seaports, each with unique features and varying levels of trade volume to test integrated scanning systems using nonintrusive inspection and radiation detection equipment (as described in the Background section, above). An evaluation report would be required to be submitted to Congress 120 days after full implementation of the pilot program.

#### **Title III: Administration**

#### Cargo Security Office at Department of Homeland Security

The amendment would establish an office within DHS to coordinate all DHS cargo security policy, coordinate DHS cargo security policies with policies of other executive agencies, consult with stakeholders, and establish standards; it also reauthorizes the Homeland Security Science and Technology Advisory Committee to provide outside expertise in advancing cargo security technology.

### Research and Development

DHS would have to coordinate within DHS and with other public and private sector entities for research and development of maritime and cargo security innovations.

## Title IV: Agency Resources and Oversight

## Office of International Trade, Cargo Policy and Trade Finance Committees

Customs and Border Protection (CBP) would establish an Office of International Trade, a Cargo Policy Committee to oversee implementation of policy for all CBP programs affecting the movement of cargo, and a Trade Finance Committee. DHS would work with appropriate Federal officials and international organizations to harmonize customs procedures, standards, requirements and commitments to facilitate the efficient flow of international trade.

The Cargo Policy Committee would work in consultation with the DHS Office of Cargo Policy. The Trade Finance Committee would coordinate and oversee the implementation of programs involved in the assessment and collection of duties on U.S. imported and exported cargo.

CBP would complete a resource allocation model by June 2007 and every 2 years thereafter to determine optimal staffing for commercial and revenue functions; additional CBP personnel to perform commercial operations and customs revenue functions are authorized, along with 725 CBP officers.

#### International Trade Data System (ITDS)

The Secretary of the Treasury would be required to oversee the establishment of an electronic trade data interchange system to eliminate redundant information requirements, to efficiently regulate the flow of commerce, and enforce regulations relating to international trade. All Federal agencies that require documentation for clearing or licensing the importation and exportation of cargo would have to participate in the ITDS, unless the Office of Management and Budget (OMB) waives the participation requirement based on national security interests.

An Interagency Steering Committee would be created to define the standard set of data elements to be collected, stored and shared in the ITDS.

### **Administration Position**

At press time, the Administration had not issued a Statement of Administration Policy (SAP) for the substitute amendment, but it did issue a SAP for the bill when it came before the House (H.R. 4954). The following is an excerpt from that SAP (the full SAP is available from RPC or from the OMB's website):

"The Administration supports House passage of H.R. 4954 and appreciates Congress's commitment to enhancing the Nation's port security. \* \* \*

The Administration strongly supports legislative authorization for the Domestic Nuclear Detection Office (DNDO), but \* \* \* is concerned that the bill would impose an organizational structure that limits the Secretary's discretion to assign functions and responsibilities to DNDO as needed to maximize its effectiveness. \* \* \* is further concerned that the bill's requirement to deploy nuclear detection systems to all major seaports, including its requirement to deploy next-generation systems to seaports with a high-volume of containerized cargo, by September 2007, might not be feasible given the current state of detector acquisition, installation, and development. \* \* \*

However, the Administration believes that the authorization in the bill for a dedicated port security grant program is unnecessary. The Administration has awarded more than \$700 million in grants since September 11, 2001, to enhance physical security in the Nation's seaports. \* \* \*

The Administration appreciates the codification of the Container Security Initiative (CSI) and the explicit authority that would be granted to the Secretary of Homeland Security to lend or otherwise assist in the deployment of inspection and detection systems. \* \* \*"

### **CBO** Estimate

The Congressional Budget Office has not provided an estimate on the cost of the substitute amendment at this time, but it produced a cost estimate of the bill as ordered reported to the House in April. The following summary is excerpted from the CBO estimate, and the full report is available at http://www.cbo.gov/showdoc.cfm?index=7179&sequence=0:

"CBO estimates that H.R. 4954 would authorize the appropriation of \$8.9 billion over the 2007-2011 period for Department of Homeland Security (DHS) programs to improve the security of U.S. ports \* \* \*. In addition, the bill would specifically authorize the appropriation of an additional \$881 million in 2012 for port security programs.

H.R. 4954 would impose new private-sector mandates, as defined in UMRA, on owners and operators of maritime terminal facilities. CBO estimates that the direct cost of complying with those mandates would be small and would fall below the annual threshold for private-sector mandates (\$128 million in 2006, adjusted annually for inflation). \* \* \*"

#### **Possible Amendments**

A number of amendments may be offered during the debate. Senator DeMint has offered an amendment that would create within the Department of Homeland Security a National Alert System.

Senator McCain has offered an amendment that would direct DHS to complete studies on the vulnerability of freight and passenger rail transportation for identification of: (1) critical assets and infrastructures and the threats to them; (2) vulnerabilities specific to the transportation of hazardous materials via railroad; (3) security weaknesses in passenger and cargo security, transportation infrastructure and emergency response planning, and (4) the cost and feasibility of requiring security screening for passengers, baggage, and cargo on passenger trains. It would also direct the Secretary of Transportation to review existing rail regulations to identify areas for revision to improve rail security, and provide funding authorizations for certain fire and life-safety improvements and infrastructure upgrades to Amtrak tunnels on the Northeast Corridor.

With many security cavities in maritime cargo inspection, some policy makers have argued that 100 percent of all cargo should be inspected before or at arrival in the United States. *One hundred percent inspection* of cargo is a topic reviewed in an RPC policy paper on port security (available at <a href="www.rpc.senate.gov">www.rpc.senate.gov</a>).

Other amendments are possible regarding air cargo security, pipeline security, foreign acquisition of American companies, and port terminals (involving the Department of Treasury's Committee on Foreign Investment (CIFIUS)), Man-Portable Air Defense Systems (MANPADS) protection (i.e., shoulder launched missiles designed to destroy an airborne target such as a commercial airliner), and chemical security protection.